



DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 502, 556, and 558

RIN 3141-AA32

Definitions; Background Investigation for Primary Management Officials and Key Employees; Gaming Licenses for Primary Management Officials and Key Employees

AGENCY: National Indian Gaming Commission, Department of the Interior.

ACTION: Proposed rule.

SUMMARY: The National Indian Gaming Commission proposes to amend its regulations to add definitions, amend existing definitions, and amend requirements for conducting background investigations and issuing licenses. Proposed amendments include adding general managers and other persons with similar management responsibility to the primary management official definition; limiting the definition to those with duties similar to those of a chief financial officer rather than persons who have financial management responsibility; and limiting primary management officials to employed management officials designated by Tribes instead of any person so designated. The proposed amendments to the key employee definition consolidate certain of its subsections; include gaming operation employees authorized for unescorted access to secured areas that are designated as such by Tribal gaming regulatory authorities; remove compensation as determinative factor with the exception of the four most highly compensated persons in the gaming operation; and allow Tribes to designate any other employee of the gaming enterprise as a key employee instead of “any other person.” Other proposed amendments incorporate the addition definitions for Gaming Enterprise and Tribal Gaming Regulatory Authority and clarify licensing application and background investigation retention. Specifically,

the proposed amendments focus on licensing of primary management officials and key employees instead of employment of them; adding notification requirements for licensing revocation decisions; specifying retention requirements of information and documentation post termination; and changing the vesting of a right to a hearing to reflect Tribal law and policy.

DATES: Written comments on this proposed rule must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email comments to:* information@nigc.gov
- *Mail comments to:* National Indian Gaming Commission, 1849 C Street, NW., MS 1621, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Michael Hoenig at (202) 420-9241

SUPPLEMENTARY INFORMATION:

I. Background and Development of the Rule

A. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act established the National Indian Gaming Commission (“NIGC” or “Commission”) and set out a comprehensive framework for the regulation of gaming on Indian lands. IGRA requires that Tribal gaming ordinances provide “an adequate system which ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and (ii) includes— (I) [T]ribal licenses for primary management officials and key employees of the gaming enterprise ...; (II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or

create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and (III) notification by the Indian Tribe to the Commission of the results of such background check before the issuance of any of such licenses.”

The Commission first defined “key employee” and “primary management official” in April of 1992 (57 FR 123802-01). As mandated by IGRA, applicants for key employee and primary management official positions are subject to a background investigation as a condition of licensure. In 2009, the Commission expanded these definitions to permit Tribes to designate other persons as key employees or primary management officials (74 FR 36926). The U.S. Department of Justice, Federal Bureau of Investigation (FBI) took issue with this expansion, denying the processing of criminal history record information (CHRI) for the expanded positions’ background investigations. This proposed rule rectifies that issue in part 502, limiting Tribal designations to “[a]ny other employee of the gaming enterprise designated by the Tribe as a key employee” and “[a]ny other employed management official of the gaming enterprise designated by the Tribe as a primary management official.”

Background investigation and licensing regulations for key employees and primary management officials were initially issued by the Commission in January of 1993 (58 FR 5802-01) in parts 556 and 558, respectively. The Commission updated these regulations in 2013 to streamline the submission of documents; to ensure that two notifications are submitted to the Commission in compliance with IGRA; and to clarify the regulations regarding the issuance of temporary and permanent gaming licenses (78 FR 5276-01). As for part 556, this proposed rule incorporates the Gaming Enterprise definition, as needed, and modernizes the licensing application and background investigation retention requirements. And for part 558, the proposed rule emphasizes primary management official and key employee licensing rather than their employment; adds notification requirements for licensing revocation decisions; details the retention requirements of information and documentation related to key employees and primary

management officials after their employment ceases; and updates the vesting of a right to a hearing to include the requirements of Tribal law and policy.

B. Development of the Rule

On, June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the key employee and primary management definitions and the backgrounding and licensing regulations. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The proposed amendments to these regulations were intended to: address FBI's concerns regarding the key employee and primary management official definitions; include gaming operation employees with unescorted access to secured areas as key employees; combine certain subsections of the key employee definition; add general managers and similar positions to the primary management official definition; and update licensing application and background investigation retention requirements. The Commission held two virtual consultation sessions in July of 2021 to receive Tribal input on the possible changes.

The Commission reviewed all comments received as part of the consultation process. Several comments were concerned that defining a key employee as a "Custodian of gambling device or system records" would make TGRA personnel key employees. To address this concern, the Commission is proposing to limit the definition to persons who perform that function "for the gaming operation." It is not the Commission's intent to capture TGRA employees or non-gaming operation personnel in the definition. A similar comment sought clarification as to whether "[a]ny person authorized by the gaming operation for unescorted access to secured areas" includes TGRA personnel. Again, it does not as in most cases the TGRA, not the gaming operation, authorizes TGRA personnel's access to restricted areas. However, under provision § 502.14(d) – "[a]ny other employee of the gaming enterprise designated by the Tribe as a key employee" – A Tribe may, at its discretion, designate TGRA

personnel as key employees through its gaming ordinance, since the “Gaming Enterprise” definition includes “the entities through which a Tribe conducts, regulates, and secures its gaming” Likewise, if it so chooses, a Tribe may deem TGRA supervisory personnel as primary management officials under § 502.19(e) — “[a]ny other employed management official of the gaming enterprise designated by the Tribe as a primary management official.” The intent of both proposed provisions is to provide maximum flexibility to Tribes.

II. Regulatory Matters

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq.

Paperwork Reduction Act

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget as required by 44 U.S.C. 3501, et seq., and assigned OMB Control Number 3141-0003.

Tribal Consultation

The National Indian Gaming Commission is committed to fulfilling its Tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. The NIGC’s consultation policy specifies that it will consult with Tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian Tribe on matters including, but not limited to the ability of an Indian Tribe to regulate its Indian gaming; an Indian Tribe’s formal relationship with the Commission; or the consideration of the Commission’s trust responsibilities to Indian Tribes.

Pursuant to this policy, on June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the key employee and primary management official regulatory definitions as well as the background and licensing regulations. Consultations with Tribes were held on July 27 and 28, 2021.

List of Subjects in 25 CFR Parts 502, 556, and 558

Gambling, Indian lands.

Therefore, for reasons stated in the preamble, 25 CFR parts 502, 556, and 558 are amended as follows:

PART 502—DEFINITIONS

1. The authority citation for part 502 continues to read as follows:

Authority: 25 U.S.C. 2701 *et seq.*

2. Revise § 502.14 to read as follows:

§ 502.14 Key employee.

Key employee means:

(a) Any person who performs one or more of the following functions for the gaming operation:

- (1) Bingo caller;
 - (2) Counting room supervisor;
 - (3) Chief of security;
 - (4) Floor manager;
 - (5) Pit boss;
 - (6) Dealer;
 - (7) Croupier;
 - (8) Approver of credit;
 - (9) Custodian of gaming systems as defined in 25 CFR 547.2 and similar class III systems, gaming cash or gaming cash equivalents, or gaming system records;
 - (10) Custodian of surveillance systems or surveillance system records.
- (b) Any person authorized by the gaming operation for unescorted access to restricted areas designated as restricted areas by the TGRA;
- (c) If not otherwise licensed as a key employee or primary management official, the four persons most highly compensated persons by the gaming operation.
- (d) Any other employee of the gaming enterprise designated by the Tribe as a key employee in its gaming ordinance.

3. Revise § 502.19 to read as follows:

§ 502.19 Primary management official.

Primary management official means:

- (a) Any person having management responsibility for a management contract;
- (b) Any person who has authority:
 - (1) To hire and fire employees of the gaming operation; or
 - (2) To establish policy for the gaming operation; or
 - (3) To supervise a key employee of the gaming operation.
- (c) The chief financial officer or a position with duties similar to a chief financial officer.
- (d) The general manager or a position with duties similar to a general manager.
- (e) Any other employed management official of the gaming enterprise designated by the Tribe as a primary management official in its gaming ordinance.

4. Add §§ 502.25 and 502.26 to read as follows:

§ 502.25 Gaming Enterprise.

Gaming Enterprise means the entities through which a Tribe conducts, regulates, and secures gaming on Indian lands within such Tribe's jurisdiction pursuant to the Indian Gaming Regulatory Act.

§ 502.26 Tribal Gaming Regulatory Authority (TGRA).

Tribal Gaming Regulatory Authority (TGRA) means the governmental entity authorized by Tribal law to regulate gaming conducted pursuant to the Indian Gaming Regulatory Act.

PART 556—BACKGROUND INVESTIGATIONS FOR PRIMARY MANAGEMENT OFFICIALS AND KEY EMPLOYEES

5. The authority citation for part 556 is revised to read as follows:

Authority: 25 U.S.C. 2706, 2710.

6. Amend § 556.4 by revising the first sentence of the introductory text to read as follows:

§ 556.4 Background investigations.

A Tribe shall perform a background investigation for each primary management official and for each key employee of the gaming enterprise. * * *

* * * * *

7. Amend § 556.6 by revising the first sentence of paragraph (a) to read as follows:

§ 556.6 Report to the Commission.

(a) When a Tribe licenses a primary management official or a key employee, the Tribe shall maintain the information listed under § 556.4(a)(1) through (14). * * *

* * * * *

8. Revise § 556.8 to read as follows:

§ 556.8 Compliance with this part.

All Tribal gaming ordinances and ordinance amendments approved by the Chair prior to [EFFECTIVE DATE OF FINAL RULE] do not need to be amended to comply with this part. All future ordinance submissions, however, must comply.

PART 558—GAMING LICENSES FOR KEY EMPLOYEES AND PRIMARY MANAGEMENT OFFICIALS

9. The authority citation for part 558 continues to read as follows:

Authority: 25 U.S.C. 2706, 2710, 2712.

10. Revise § 558.3 to read as follows:

§ 558.3 Notification to NIGC of license decisions and retention obligations.

(a) After a Tribe has provided a notice of results of the background check to the Commission, a Tribe may license a primary management official or key employee.

(b) Within 30 days after the issuance of the license, a Tribe shall notify the Commission of its issuance.

(c) A key employee or primary management official who does not have a license after ninety (90) days shall not be permitted to perform the duties, functions, and/or responsibilities of a key employee or primary management official until so licensed.

(d) If a Tribe does not license an applicant—

(1) The Tribe shall notify the Commission; and

(2) Shall forward copies of its eligibility determination and notice of results, under § 556.6(b)(2) of this chapter, to the Commission for inclusion in the Indian Gaming Individuals Record System.

(e) If a Tribe revokes a key employee or primary management official's license—

(1) The Tribe shall notify the Commission; and

(2) Shall forward copies of its license revocation decision and a summary of the evidence it relied upon to the Commission for inclusion in the Indian Gaming Individuals Record System.

(f) A Tribe shall retain the following for inspection by the Chair or their designee for no less than three years from the date of termination of employment:

(1) The information listed under § 556.4(a)(1) through (14) of this chapter;

- (2) Investigative reports, as defined in § 556.6(b) of this chapter;
- (3) Eligibility determinations, as defined in § 556.5 of this chapter;
- (4) Privacy Act notice, as defined in §556.2 of this chapter; and
- (5) False Statement notice, as defined in §556.3 of this chapter.

11. Revise § 558.4 to read as follows:

§ 558.4 Notice of information impacting eligibility and licensee's right to a hearing.

(a) If, after the issuance of a gaming license pursuant to § 558.3, the Commission receives reliable information indicating that a key employee or a primary management official is not eligible for a license under § 556.5 of this chapter, the Commission shall notify the issuing Tribe of the information.

(b) Upon receipt of such notification under paragraph (a) of this section, a Tribe shall immediately suspend the license and shall provide the licensee with written notice of suspension and proposed revocation.

(c) A Tribe shall notify the licensee of a time and a place for a hearing on the proposed revocation of a license.

(d) The right to a revocation hearing shall vest upon receipt of a license or at such earlier time as is determined by Tribal law, regulation, and/or policy.

(e) After a revocation hearing, a Tribe shall decide to revoke or to reinstate a gaming license. A Tribe shall notify the Commission of its decision within 45 days of receiving notification from the Commission pursuant to paragraph (a) of this section.

12. Revise § 558.6 to read as follows:

§ 558.6 Compliance with this part.

All Tribal gaming ordinances and ordinance amendments that have been approved by the Chair prior to [EFFECTIVE DATE OF FINAL RULE] do not need to be amended to comply with this section. All future ordinance submissions, however, must comply.

Date: August 2, 2022.

E. Sequoyah Simermeyer
Chairman

Jeannie Hovland
Vice Chair

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